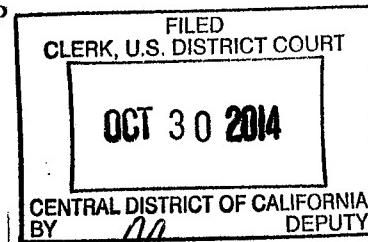


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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

12 BETWEEN THE LINES
13 PRODUCTIONS, LLC a California
limited liability company,

14 Plaintiff.

v.

LIONS GATE ENTERTAINMENT
CORP., a British Columbia corporation,
and SUMMIT ENTERTAINMENT,
LLC, a Delaware limited liability
company,

Defendants.

Case No. 2:14-cv-00104-R (PJWx)

**PROPOSED STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW RE
DEFENDANTS' MOTION FOR
SUMMARY ADJUDICATION**

Date: October 20, 2014

Time: 10:00 a.m.

Ctrm: 8

Judge: Hon. Manuel L. Real

Complaint filed: Dec. 16, 2013
Trial Date: Nov. 25, 2014

22 AND RELATED COUNTERCLAIMS.

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1 Defendant Lions Gate Entertainment Corp. (“Lions Gate”) and Defendant and
 2 Counterclaimant Summit Entertainment, LLC (“Summit”) (collectively,
 3 “Defendants”) having moved for summary adjudication on September 22, 2014
 4 (Dkt. 71), which motion came for hearing on October 20, 2014, the Court finds that
 5 the following facts are uncontested and makes the conclusions of law set forth
 6 below.

7 I. STATEMENT OF UNCONTROVERTED FACTS

	UNCONTROVERTED FACT	SUPPORTING EVIDENCE
10	1. Since at least as early as 1991, Summit and its 11 predecessors have been active participants in the 12 motion picture industry. Summit has produced 13 and distributed films and related entertainment 14 products, and has also been involved in motion picture financing, production, and distribution services.	Dkt. 71-2 (Dkt. 71-2) ¶ 2.
15	2. Summit is the producer and distributor of the 16 successful and famous motion picture <i>Twilight</i> and 17 its equally successful and famous sequels, namely, <i>The Twilight Saga: New Moon</i> (“ <i>New Moon</i> ”), <i>The Twilight Saga: Eclipse</i> , <i>The Twilight Saga:</i> <i>Breaking Dawn - Part 1</i> , and <i>The Twilight Saga:</i> <i>Breaking Dawn - Part 2</i> (collectively, the 18 “ <i>Twilight</i> Motion Pictures”). Summit is the sole 19 owner of the copyrights associated with the 20 <i>Twilight</i> Motion Pictures.	Dkt. 71-2 (Kimbrough Decl.) ¶ 2.
22	3. Summit – not Lions Gate – is the owner of the 23 trademark TWILIGHT in block letters and in 24 distinctive stylized font (the “stylized TWILIGHT mark”), the trademark THE TWILIGHT SAGA, 25 and other marks including the term TWILIGHT including, but not limited to the mark TWIHARD 26 (collectively the “TWILIGHT Marks”).	Dkt. 71-2 (Kimbrough Decl.) ¶ 4.

	UNCONTROVERTED FACT	SUPPORTING EVIDENCE
4.	Summit – not Lions Gate – is the copyright owner of the publicity, promotional, unit, and special shoot photography relating to the <i>Twilight</i> Motion Pictures.	Dkt. 71-2 (Kimbrough Decl.) ¶ 7, Ex. B.
5.	Summit is the copyright owner in promotional posters for <i>New Moon</i> depicting the characters Edward, Jacob, and Bella (the “New Moon Poster”) and characters from <i>New Moon</i> known as the “Wolfpack” (the “Wolfpack Poster”).	Dkt. 71-2 (Kimbrough Decl.) ¶ 7, Ex. B.
6.	Summit is the copyright owner for a promotional poster for <i>Eclipse</i> depicting the characters Edward, Bella, and Jacob (the “Eclipse Poster”).	Dkt. 71-2 (Kimbrough Decl.) ¶ 7, Ex. B.
7.	Summit registered its copyright ownership in the New Moon Poster with the U.S. Copyright Office on November 6, 2009, which was granted Registration No. VA 1-689-491.	Dkt. 71-2 (Kimbrough Decl.) ¶ 7, Ex. B.
8.	Summit registered its copyright ownership in the Wolfpack Poster with the U.S. Copyright Office on November 6, 2009, which was granted Registration No. VA 1-689-492.	Dkt. 71-2 (Kimbrough Decl.) ¶ 7, Ex. B.
9.	Summit registered its copyright ownership in the Eclipse Poster with the U.S. Copyright Office on June 25, 2011, which was granted Registration No. VA 1-778-457.	Dkt. 71-2 (Kimbrough Decl.) ¶ 7, Ex. B.
10.	Summit – not Lions Gate – owns the copyrights in the <i>Twilight</i> Motion Pictures themselves.	Dkt. 71-2 (Kimbrough Decl.) ¶ 8, Ex. C.
11.	Summit has licensed its copyrighted photographs to third parties to promote the <i>Twilight</i> Motion Pictures, as well as for use on clothing and other products related to the <i>Twilight</i> Motion Pictures and/or bearing the TWILIGHT mark.	Dkt. 71-2 (Kimbrough Decl.) ¶ 9.

	UNCONTROVERTED FACT	SUPPORTING EVIDENCE
12.	Summit owns copyrights in various other photographs and artwork associated with and derived from the <i>Twilight</i> Motion Pictures.	Dkt. 71-2 (Kimbrough Decl.) ¶ 5.
13.	Lions Gate is a corporation organized under the laws of British Columbia, Canada. Summit, an indirect wholly-owned subsidiary of Lions Gate, is a Delaware limited liability company. Summit is a separate and distinct entity from Lion Gate. Summit maintains distinct corporate books and bank accounts. Summit collects its own revenues. Lions Gate and Summit conduct separate board meetings and maintain separate corporate minutes. Lions Gate and Summit generally have separate corporate officers and directors. Summit enters into contracts on its own behalf. Lions Gate is generally not a party to the contracts that Summit enters. Lions Gate does not supervise the day-to-day affairs of Summit.	Dkt. 80-1 (Supp. Kimbrough Decl.) ¶¶ 5-6.
14.	Between the Lines Productions, LLC (“BTL”) BTL produced a motion picture entitled <i>Twiharder</i> .	Dkt. 1 ¶ 169.
15.	To promote <i>Twiharder</i> , BTL uses the word “Twiharder” and a stylized “Twiharder” logo.	Dkt. 16 at 28:22-31:28, Ex. E.
16.	BTL promotes <i>Twiharder</i> on a website on the domain name <www.twiharder.com>, which features, among other things, promotional artwork and trailers for and music videos related to <i>Twiharder</i> .	Dkt. 16 at 28:22-31:28, Ex. E.
17.	BTL distributes through its website and other channels posters and other artwork to promote <i>Twiharder</i> , many of which intentionally approximate Summit’s promotional materials for <i>New Moon</i> and <i>Eclipse</i> , including the Wolfpack Poster and Eclipse Poster.	Dkt. 16 at 28:22-31:28, Ex. E.

	UNCONTROVERTED FACT	SUPPORTING EVIDENCE
18.	BTL offers for sale digital downloads of its promotional materials, as well as other artwork, on its website.	Dkt. 16 at 28:22-31:28, Ex. E,
19.	BTL has also offered for sale and sold, without Summit's authorization, various types of merchandise – including clothing, hats, beverageware, coasters, notebooks, and tote bags – bearing the TWIHARDER mark and promotional artwork related to <i>Twiharder</i> .	Dkt. 16 at 28:22-31:28, Ex. E.
20.	BTL alleges that there was significant interest in international distribution for <i>Twiharder</i> .	Dkt. 71-3 (Bost Decl.) ¶ 7, Ex. F at p.4.
21.	BTL claims that, in or around April 2012, it was offered a license agreement for distribution of <i>Twiharder</i> by Gravitas Ventures, which indicated its intent to pitch <i>Twiharder</i> to Gravitas Ventures' distribution partner Warner Brothers Digital Distribution.	Dkt. 71-3 (Bost Decl.) ¶ 7, Ex. F at ¶¶ 215-226.
22.	BTL also claims that, in or around June 2012, it was offered errors and omissions ("E & O") insurance by Chubb Insurance.	Dkt. 71-3 (Bost Decl.) ¶ 7, Ex. F at p.5 and ¶¶ 232-241.
23.	On June 27, 2012, and shortly after it became aware of <i>Twiharder</i> , Summit – not Lions Gate – sent BTL a cease-and-desist letter related to <i>Twiharder</i> . On July 12, 2012, BTL responded to Summit's cease-and-desist letter. BTL and Summit thereafter exchanged further correspondence debating the merits of their respective positions.	Dkt. 16 at 28:22-24, 32:21-25, Ex. F; Dkt. 71-3 (Bost Decl.) ¶ 7, Ex. F at ¶ 253.
24.	On December 20, 2012, Summit representatives and its counsel convened with BTL's counsel for a screening of <i>Twiharder</i> in an attempt to settle their dispute.	Dkt. 16 at 32:26-33:6.

	UNCONTROVERTED FACT	SUPPORTING EVIDENCE
25.	According to BTL, within days of receiving Summit's June 27, 2012 cease-and-desist letter, BTL's purported distributor (Gravitas Pictures) and potential insurer (Chubb Insurance) revoked their distribution and insurance offers to BTL. In particular, BTL claims that it was notified that Chubb Insurance revoked its offer for E&O insurance on July 16, 2012 and that Gravitas Ventures conditionally revoked its offer for distribution on July 24, 2012.	Dkt. 71-3 (Bost Decl.) ¶ 7, Ex. F at p.5 and ¶¶ 254-259.
26.	On May 28, 2013, BTL filed a 219-page "Anti-Trust Complaint" (1,300+ pages with exhibits) against Defendants in the Southern District of New York (the "First Lawsuit").	Dkt. 71-3 (Bost Decl.) ¶ 7, Ex. F.
27.	On June 28, 2013, Defendants filed a motion to transfer venue of the First Lawsuit to the Central District of California under 28 U.S.C. § 1404.	Dkt. 71-3 (Bost Decl.) ¶ 8; Dkt. 66.
28.	On July 30, 2013, Judge Jed Rakoff of the Southern District of New York granted Defendants' motion to transfer, and the First Lawsuit was transferred and assigned to the Hon. Margaret M. Morrow.	Dkt. 71-3 (Bost Decl.) ¶ 9; Dkt. 66.
29.	After the First Lawsuit was transferred, Defendants filed a motion to dismiss BTL's antitrust, trademark cancellation, and DMCA claims.	Dkt. 71-3 (Bost Decl.) ¶ 10; Dkt. 66.
30.	On October 2, 2013, BTL filed a 186-page First Amended Complaint pursuant to FRCP 15(a)(1)(B), in which it voluntarily dismissed its trademark cancellation and DMCA claims, but continued to assert its antitrust and declaratory judgment claims.	Dkt. 71-3 (Bost Decl.) ¶ 11.

	UNCONTROVERTED FACT	SUPPORTING EVIDENCE
31.	Defendants filed a second motion to dismiss on October 22, 2013, which again sought dismissal of Plaintiff's antitrust claim, and set hearing for December 2, 2013. BTL never filed an opposition.	Dkt. 71-3 (Bost Decl.) ¶ 12; Dkt. 66.
32.	Instead, BTL launched a series of vexatious and meritless filings. BTL also refused to comply with its discovery obligations, forcing Defendants to file a motion to compel.	Dkt. 71-3 (Bost Decl.) ¶ 13; Dkt. 66.
33.	While Defendants' motion to compel was pending, and after each of BTL's filings was denied, BTL voluntarily dismissed the First Lawsuit without prejudice pursuant to FRCP 41(a)(1) on December 13, 2013, the day its opposition to Defendants' second motion to dismiss was due.	Dkt. 71-3 (Bost Decl.) ¶ 14; Dkt. 66.
34.	On December 16, 2013, BTL filed the present action in the Southern District of New York (the "Second Lawsuit").	Dkt. 1 and 66.
35.	The very next business day, December 16, 2013, BTL re-filed its lawsuit – the present action – in the Southern District of New York (the "Second Lawsuit").	Dkt. 71-3 (Bost Decl.) ¶ 3, Ex. B; Dkt. 66.
36.	On January 6, 2014, Judge Rakoff <i>sua sponte</i> transferred the action – again – to the Central District of California.	Dkt. 71-3 (Bost Decl.) ¶ 3, Ex. B; Dkt. 66.
37.	Despite BTL's refusal to serve Defendants with a copy of its Complaint, Defendants, on January 27, 2014, filed their Answer and Summit's Counterclaims.	Dkt. 16 and 66.
38.	On March 10, 2014, BTL filed an unmeritorious motion to dismiss Summit's Counterclaims.	Dkt. 24 and 44.

	UNCONTROVERTED FACT	SUPPORTING EVIDENCE
39.	On June 25, 2014, BTL filed its Answer to Summit's Counterclaims, in which it acknowledged its intent to raise "counterclaims against Summit's counterclaims."	Dkt. 45.
40.	On August 1, 2014, BTL filed a motion for leave to amend and, on August 18, 2014, BTL lodged its 135-page proposed First Amended Complaint.	Dkt. 48, 51 and 66.
41.	On September 15, 2014, the Court issued an Order Denying Plaintiff's Motion for Leave to file an Amended Complaint. On September 19, 2014, the Court issued an Order Denying Plaintiff's Motion for Leave to file an Amended Complaint. In the Order, the Court found that, in the First Lawsuit, BTL had "refused to comply with discovery," "filed a series of vexatious and meritless filings" and voluntarily dismissed the First Lawsuit "ostensibly to avoid an adverse ruling" on Defendants' motion to dismiss BTL's antitrust claims. The Court also found that, in the Second Lawsuit, BTL had acted in bad faith to "unnecessarily drag out these proceedings" and "to increase the costs of litigation to Defendants."	Dkt. 66.

20 II. **CONCLUSION OF LAW**

21 A. **Summary Judgment Standard**

22 Pursuant to FRCP 56(a), a party may move for summary judgment or
 23 summary adjudication, "identifying each claim or defense—or the part of each claim
 24 or defense—on which summary judgment is sought." Fed.R.Civ.P. 56(a).

25 Summary judgment is warranted where "there is no genuine dispute as to any
 26 material fact and the movant is entitled to judgment as a matter of law." *Id.* A
 27 material fact is one that "might affect the outcome of the suit under the governing
 28 law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91

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1 L. Ed. 2d 202, 211 (1986). An issue of material fact is “genuine” only “if the
 2 evidence is such that a reasonable jury could return a verdict for the non-moving
 3 party.” *Id.* at 248. “Where the record taken as a whole could not lead a rational trier
 4 of fact to find for the non-moving party, there is no genuine issue for trial.”
 5 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct.
 6 1348, 1356, 89 L. Ed. 2d 538, 553 (1986).

7 Summary judgment, therefore, is mandated where the non-moving party fails
 8 to sufficiently establish the existence of an element essential to its claim or defense
 9 and on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477
 10 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986). In such a case,
 11 “[t]here can be ‘no genuine issue as to any material fact,’ since a complete failure of
 12 proof concerning an essential element of the nonmoving party’s case necessarily
 13 renders all other facts immaterial.” *Id.* at 322-23. The moving party is not required
 14 to negate its opponent’s claim; instead, “the burden on the moving party may be
 15 discharged by ‘showing’—that is, pointing out to the district court—that there is an
 16 absence of evidence to support the nonmoving party’s case.” *Id.* at 325. Summary
 17 judgment “dispose[s] of factually unsupported claims or defenses.” *Id.* at 323-24.
 18 A summary judgment motion “cannot be defeated by relying solely on conclusory
 19 allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th
 20 Cir. 1989); *see also In re Lewis*, 97 F.3d 1182, 1187 (9th Cir. 1996). To survive
 21 summary judgment, the nonmovant must produce some “significant probative
 22 evidence” to support its claim. *Lewis*, 97 F.3d at 1187.

23 B. Lions Gate Is Entitled To Summary Adjudication

24 1. Lions Gate Is Entitled To Summary Adjudication On Count
 I (Non-Infringement) And Court II (Non-Infringement/Non-
 Dilution) Of BTL’s Complaint

26 Lions Gate is not a proper party to Counts I and II. There is no genuine
 27 dispute of material fact as to whether Summit – not Lions Gate – owns all of the
 28 copyrights, trademarks and service marks in, and related to, the *Twilight* Motion

1 Pictures that are at issue in this matter. Accordingly, Lions Gate is entitled to
 2 summary adjudication on Count I (Non-Infringement) and Count II (Non-
 3 Infringement/Non-Dilution) of BTL's complaint.

4 **2. Lions Gate Is Entitled To Summary Adjudication On Count**
 5 **III (Prima Facie Tort) In BTL's Complaint**

6 A parent company will not be held liable for the torts of its subsidiary unless
 7 it can be shown that the parent exercises complete dominion and control over the
 8 subsidiary." *Serrano v. N.Y. Times Co.*, 19 A.D.3d 577, 578 (N.Y. App. Div. 2d
 9 Dep't 2005); *see also Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152, 163 (N.Y.
 10 1980) (parent liability may only be imposed where, "[a]t the very least, there [is]
 11 direct intervention by the parent in the management of the subsidiary to such an
 12 extent that 'the subsidiary's paraphernalia of incorporation, directors and officers
 13 are completely ignored."). The only evidence BTL has cited is its assertion that
 14 David C. Friedman, Esq. and Robert Mason, Esq. were copied on the parties'
 15 correspondence related to *Twiharder*. This evidence is insufficient to find that
 16 Lions Gate "exercises complete dominion and control" over Summit or that Lions
 17 Gate even authorized, ratified or approved the correspondence or its contents.
 18 Accordingly, there is no genuine dispute of material fact as to whether Lions Gate is
 19 liable for the alleged torts of its subsidiary Summit and, therefore, Lions Gate is
 20 entitled to summary adjudication on Count III (Prima Facie Tort).

21 **C. Summit Is Not Entitled To Summary Adjudication On Count III**
 22 **(Prima Facie Tort) In BTL's Complaint**

23 Under New York law, it is not settled that prima facie tort claims are subject
 24 to a one-year or three-year statute of limitations.¹ *See, e.g., Evans*, 2012 U.S. Dist.

25 ¹ In its motion for summary adjudication, Summit asserted that it sought
 26 summary adjudication of BTL's claim for prima facie tort on statute of limitations
 27 grounds. In its reply in support of its motion for summary adjudication, Summit
 28 asserted additional grounds for summary adjudication. Because it is improper to

1 LEXIS 109849, at **26-27 n. 14 (recognizing “conflict in New York State law as to
 2 which statute of limitations should be applicable” to *prima facie* tort claims, but
 3 refusing to resolve where plaintiff alleged lost wages and benefits allegedly suffered
 4 as a result of termination of plaintiff’s employment); *Havell v. Islam*, 739 N.Y.S.2d
 5 371, 372 (N.Y. App. Div. 1st Dep’t 2002) (“A claim for damages for intentional
 6 tort, including a tort not specifically listed in CPLR 215(3), is subject to a one-year
 7 limitation period...and where, as here, a reading of the factual allegations discloses
 8 that the essence of the cause of action is an intentional tort, plaintiff cannot avoid a
 9 statute of limitations bar by labeling the action as one to recover damages for *prima*
 10 *facie* tort.”) (internal citations omitted). Regardless, under New York law, “a cause
 11 of action accrues when an actionable injury has been suffered...that is, ‘when all
 12 elements of the tort can be truthfully aligned in a complaint.’” *Marine Midland*
 13 *Bank v. Renck*, 195 A.D.2d 871, 873 (3d Dep’t 1993). Here, there is a dispute of
 14 material fact as to when BTL’s *prima facie* tort cause of action accrued. Summit
 15 contends that it accrued in July 2012, when BTL learned that its offers for
 16 distribution and insurance had been revoked. BTL contends that its cause of action
 17 for *prima facie* tort accrued in April 2013, at which time it came to understand that
 18 Summit’s conduct was motivated by alleged “disinterested malevolence.”
 19 Accordingly, there is a genuine dispute of material fact as to whether BTL’s claims
 20 for *prima facie* tort is barred by the statute of limitations and, therefore, summary
 21 adjudication on Count III (Prima Facie Tort) is not appropriate.

22 D. **Summit Is Entitled To Summary Adjudication On BTL’s First,**
 23 **Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, Fourteenth,**
Sixteenth, Seventeenth And Eighteenth Defenses

24 1. **Summit Is Entitled To Summary Judgment On BTL’s First**
 25 **Defense (Failure To State A Claim)**

26
 27 raise new arguments on reply for the first time, the Court declines to consider the
 28 additional grounds set forth in Summit’s reply.

1 “Failure to State a Claim” is not a valid affirmative defense. *Zivkovic v. S.*
 2 *Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) (“A defense which
 3 demonstrates that plaintiff has not met its burden of proof is not an affirmative
 4 defense.”); *Joe Hand Prom., Inc. v. Estrada*, 2011 U.S. Dist. LEXIS 61010, at *5
 5 (E.D. Cal. June 7, 2011) (“Failure to state a claim is an assertion of a defect in
 6 Plaintiff’s *prima facie* case, not an affirmative defense.”); *Barnes v. AT&T Pension*
 7 *Benefit Plan*, 718 F. Supp.2d 1167, 1174 (N.D. Cal. 2010) (same). Because “failure
 8 to state a claim” is not a valid affirmative defense, summary adjudication is proper.

9 **2. Summit Is Entitled To Summary Judgment On BTL’s
 10 Fourth Defense (Waiver/Forfeiture)**

11 BTL has not introduced any evidence in support of its Fourth Defense
 12 (Waiver/Forfeiture). Accordingly, summary adjudication is proper.

13 **3. Summit Is Entitled To Summary Judgment On BTL’s Fifth
 14 Defense (Estoppel)**

15 BTL has not introduced any evidence in support of its Fifth Defense
 16 (Estoppel). Accordingly, summary adjudication is proper.

17 **4. Summit Is Entitled To Summary Judgment On BTL’s Eighth
 18 Defense (Illegality)**

19 BTL has not introduced any evidence in support of its Eighth Defense
 20 (Illegality). Accordingly, summary adjudication is proper.

21 **5. Summit Is Entitled To Summary Judgment On BTL’s Ninth
 22 Defense (Acquiescence)**

23 BTL has not introduced any evidence in support of its Ninth Defense
 24 (Acquiescence). Accordingly, summary adjudication is proper.

25 **6. Summit Is Entitled To Summary Judgment On BTL’s Tenth
 26 Defense (License)**

27 BTL has not introduced any evidence in support of its Tenth Defense
 28 (License). Accordingly, summary adjudication is proper.

29 **7. Summit Is Entitled To Summary Judgment On BTL’s
 30 Eleventh Defense (Assumption of Risk)**

1 BTL has not introduced any evidence in support of its Eleventh Defense
 2 (Assumption of Risk). Accordingly, summary adjudication is proper.

3 **8. Summit Is Entitled To Summary Judgment On BTL's
 Fourteenth Defense (Preemption)**

4 BTL failed to address its Fourteenth Defense (Preemption) in its opposition to
 5 Summit's motion for summary adjudication. Accordingly, summary adjudication is
 6 proper.

7 **9. Summit Is Entitled To Summary Judgment On BTL's
 Sixteenth Defense (Invalidity)**

8 BTL failed to address its Sixteenth Defense (Invalidity) in its opposition to
 9 Summit's motion for summary adjudication. Accordingly, summary adjudication is
 10 proper.

11 **10. Summit Is Entitled To Summary Judgment On BTL's
 Seventeenth Defense (Independent Creation)**

12 In its opposition, BTL withdrew its Seventeenth Defense (Independent
 13 Creation). Accordingly, summary adjudication is proper.

14 **11. Summit Is Entitled To Summary Judgment On BTL's Eighth
 Defense (Improper Transfer Of Venue Under 28 USC
 1404(a))**

15 In its opposition, BTL withdrew its Eighteenth Defense (Improper Transfer
 16 Of Venue Under 28 USC 1404(a)). Accordingly, summary adjudication is proper.

17 **E. Summit Is Not Entitled To Summary Adjudication On BTL's
 Second (Laches) And Third (Statute Of Limitation) Defenses**

18 To establish laches, BTL must prove that: (a) Summit delayed in bringing
 19 suit; (b) Summit alleged delay was unreasonable; and (c) BTL was prejudiced by the
 20 alleged delay. *Internet Specialties West, Inc. v. Milon-Digiorgio Enter.,* 559 F.3d
 21 985, 990 (9th Cir. 2009).

22 To establish its affirmative defense of "Statute of Limitations," BTL must
 23 show that each of Summit's claims are barred by the relevant limitations period.
 24 The statute of limitations for state trademark infringement and claims brought under
 25 the Lanham Act is four years from the date the plaintiff knew or in the exercise of

1 reasonable care would have known of the violation. *See Miller*, 318 F. Supp.2d at
2 942 n. 11 (stating there is a four-year statute of limitations period for violations of
3 state trademark infringement and dilution). The statute of limitations for statutory
4 unfair competition law is four years from the date of discovery. *See Cal. Bus. &*
5 *Prof. Code § 17208; Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1192-96
6 (2013). The statute of limitations for common law unfair competition law is two
7 years from the date of discovery. *Garcia v. Coleman*, 2008 U.S. Dist. LEXIS
8 68672, *26 (N.D. Cal. Sept. 8, 2008). Lastly, the statute of limitations for copyright
9 infringement is three years from the time the plaintiff knew of the violation.
10 17 U.S.C. § 507; *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. 1994).

11 Here, there is dispute of material fact as to when Summit knew or should have
12 known of BTL's conduct. Summit contends that it did not become aware of BTL's
13 conduct until November or December 2011. BTL alleges it published its allegedly
14 infringing materials between February 2010 and December 2010, and that Summit
15 knew or should have known about BTL's allegedly infringing conduct at that time.
16 Thus, there is a factual dispute as to the date that Summit first knew or should have
17 known of BTL's allegedly infringing conduct. Accordingly, summary adjudication
18 cannot be granted at this time.

19 Respectfully submitted,

20 SHEPPARD, MULLIN, RICHTER &
21 HAMPTON LLP

22 Dated: October 23, 2014

23 By: /s/ Jill M. Pietrini
24 Jill M. Pietrini

25 Attorneys for Defendants and Counterclaimant

26 *Read, studied*

27
28 10-30-14